

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY BAIN,

Defendant-Appellee.

UNPUBLISHED

June 21, 2007

No. 268527

Wayne Circuit Court

LC No. 04-006928

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted from an order granting defendant's motion to suppress the results of two DataMaster breath-alcohol tests. We reverse and remand.

Following a traffic stop, defendant was arrested for driving with an unlawful breath-alcohol level. He was transported to the police department and administered two DataMaster breath-alcohol tests. The results showed that defendant had 0.19 grams and 0.18 grams of alcohol per 210 liters of breath. Because defendant had two prior alcohol-related convictions, he was bound over to circuit court on a felony charge of operating a motor vehicle with an alcohol content of 0.08 grams or more per 210 liters of breath, contrary to MCL 257.625(1)(b). Defendant thereafter filed a motion to quash the information and suppress the evidence of the breath-alcohol test results. After an evidentiary hearing, the trial court granted the motion to suppress.

On appeal, the prosecution argues that a proper foundation to admit the DataMaster test results did not require expert testimony, and further, even if expert testimony is considered, the trial court erroneously excluded the evidence, on the basis of its belief that the results did not accurately reflect defendant's blood-alcohol content, an issue it was not required to prove at trial.

In general, we review a trial court's evidentiary rulings for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But preliminary questions of law, such as whether a rule of evidence or a statute precludes admission, are reviewed de novo. *Id.* A trial court's factual findings at a hearing on the admissibility of scientific evidence are reviewed for clear error. *People v Holtzer*, 255 Mich App 478, 484; 660 NW2d 405 (2003).

The proponent of evidence has the burden of establishing a proper foundation. See *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989); *People v White*, 208 Mich

App 126, 131; 527 NW2d 34, 37 (1994). Here, we agree with the prosecution that it was not required to offer expert testimony to establish a proper foundation to admit the breath-alcohol test results. The principles set forth in *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597; 705 NW2d 703 (2005), lv pending, regarding the admissibility of novel scientific evidence, do not apply here, because the Legislature has enacted a statutory rule of evidence, MCL 257.625a, that specifically governs the admissibility of chemical-test evidence.¹

The Legislature can enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence. See MRE 101; *People v McDonald*, 201 Mich App 270, 273; 505 NW2d 903 (1993). The Legislature, through the authority granted to the Department of State Police to promulgate administrative rules governing the selection of breath-alcohol testing instruments and their use, has made a legislative determination that testing under the DataMaster is generally reliable and admissible. Cf. *State v Vega*, 12 Ohio St 3d 185, 188-189; 465 NE2d 1303 (1984) (legislative enactment resolved questions of reliability and relevancy of breath-testing devices); see also *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993) (purpose of administrative rules is to ensure accuracy). Expert testimony regarding the accuracy of the breath test results is not required. *People v Wager*, 460 Mich 118, 125-126, 125; 594 NW2d 487 (1999). The material question is whether there is a deviation from administrative rules that calls into question the accuracy of the test. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001).

Because the trial court did not find any deviation from the administrative rules in the manner in which the Department of State Police selected the DataMaster, or in its use by the Wyandotte police to determine defendant's breath-alcohol content, we conclude that the trial court erred in relying on the testimony of defendant's expert, Charles Simpson, to exclude the evidence. In any event, Simpson's testimony did not provide a basis for excluding the breath-alcohol test results. Unlike *Clerc*, this case did not involve the admissibility of expert testimony at trial under MRE 702. Rather, the trial court considered Simpson's testimony for the purpose of determining whether the DataMaster was reliable under *Davis-Frye*² analysis. *Davis-Frye* analysis has been applied in Michigan to various scientific devices and techniques to assess their reliability. *People v Beckley*, 434 Mich 691, 718-719; 456 NW2d 391 (1990) (Brickley, J.) It only applies to novel scientific principles. *Clerc*, *supra* at 603.

Here, the trial court did not find that the infrared spectrometry used by the DataMaster to measure breath-alcohol was novel science. Rather, the trial court excluded the breath-alcohol test results after determining, based on Simpson's testimony, that the breath-alcohol test results

¹ We find no merit to defendant's contention that infrared spectrometry, on which the DataMaster is based, is not a chemical test within the meaning of the statute. See *State v Squires*, 311 SC 11, 14-15; 426 SE2d 738 (1992). We are not bound by foreign authority, but we may find it persuasive. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, ____ n 15; ____ NW2d ____ (2007).

² *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

could not be extrapolated or converted to a blood-alcohol result, through the use of a partition ratio of 2,100 to 1,³ with a rate of error acceptable to the scientific community.

We agree with the prosecution that the trial court did not give proper consideration to its offer to use the evidence to establish defendant's breath-alcohol content. The inadmissibility of evidence for one purpose does not render its use inadmissible for another purpose. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Relevant evidence is "evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probative than it would be without the evidence)." *Sabin, supra* at 57; MRE 401.

The statutory provision under which defendant was charged requires proof of "an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine." MCL 257.625(1)(b). Although the disjunctive word "or" is sometimes misused in statutes, its literal meaning should be followed if it does not render the statute dubious. *People v Gatski*, 260 Mich App 360, 365; 677 NW2d 357 (2004). We may not read anything into an unambiguous statute that is not within the Legislature's manifest intent, as derived from the words used. *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003).

Examined in context, the use of "or" in MCL 257.625(1)(b) plainly does not require the prosecution to prove a person's body alcohol content in all three different ways. Because defendant was only charged with an alcohol level of 0.08 grams or more per 210 liters of breath, and the evidence was offered to prove this charge, the trial court erred in excluding the evidence on the basis of the partition ratio. Simply put, the partition ratio is not relevant to the purpose for which the evidence was offered. Therefore, we reverse the trial court's decision to exclude the evidence.

In light of our decision, it is unnecessary to address the prosecution's claim that the partition ratio, even if relevant to the charge, does not require exclusion of the evidence because defendant's breath-alcohol test results were significantly higher than the required alcohol content of 0.08 grams per 210 liters of breath. We express no opinion on the admissibility of any evidence that defendant might offer at trial to defend against the charge, our review being limited to the admissibility of the DataMaster test results of 0.19 grams and 0.18 grams per 210 liters of breath.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

³ According to Simpson's testimony, the partition ratio relates a person's liquid and gas concentrations of a substance. Simpson testified that the partition ratios vary because people have different pulmonary capacities, but that the average partition ratio is 2,300 to 1.